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No. 09-157

In the Supreme Court of the United States

JINGHAI LI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 8 U.S.C. 1252(d)(1), a "court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." The question presented is:

Whether the court of appeals correctly declined to review petitioner's claim of ineffective assistance of counsel, which he had not raised before the Board of Immigration Appeals, either on direct appeal or in a motion to reopen proceedings.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-5), as amended (Pet. App. 1-2), is not published in the *Federal Reporter* but is reprinted in 306 Fed. Appx. 387. The decisions of the Board of Immigration Appeals (Pet. App. 6-7) and the immigration judge (Pet. App. 8-20) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2009. A petition for rehearing was denied on May 7, 2009 (Pet. App. 2). The petition for a writ of certiorari was filed on August 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, administrative proceedings about whether an alien is entitled to remain in the United States typically begin before an immigration judge. 8 U.S.C. 1229a(a). After a hearing, the immigration judge issues a decision on the alien's removability and eligibility for relief from removal. 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12(a). If the immigration judge enters an order of removal, the statute requires the immigration judge to "inform the alien of the right to appeal that decision." 8 U.S.C. 1229a(c)(5). The Board of Immigration Appeals (Board or BIA) hears appeals from decisions of immigration judges. 8 C.F.R. 1003.1(b), 1240.15. If the Board affirms an immigration judge's order of removal, that order becomes "final." 8 U.S.C. 1101(a)(47)(B).

After a final order of removal has been issued, "[a]n alien may file one motion to reopen proceedings" before the agency. 8 U.S.C. 1229a(c)(7)(A); see 8 C.F.R. 1003.2(c)(2). Such a motion must "state the new facts that will be proven at a hearing to be held if the motion is granted" and "be supported by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); see 8 C.F.R. 1003.2(c)(1). In addition, "[t]he Board may at any time reopen * * * on its own motion any case in which it has rendered a decision." 8 C.F.R. 1003.2(a).

b. An alien may seek judicial review of a final order of removal by filing a petition for review in a United States Court of Appeals. 8 U.S.C. 1252(a)(1), (4) and (5). Under 8 U.S.C. 1252(d)(1), however, a court "may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right."

2. a. Petitioner is a Chinese native and citizen who was admitted to the United States on September 3, 1998. Pet. App. 9. He filed an application for asylum on November 1, 1999, *ibid.*, even though such an application generally must be filed "within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. 1158(a)(2)(B). In January 2000, the Immigration and Naturalization Service served petitioner with a notice to appear in removal proceedings, charging him with being removable on the ground that he had been inadmissible when he entered the United States because he was not "in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document." 8 U.S.C. 1182(a)(7)(A)(i)(I), 1227(a)(1)(A); Admin. R. 488-489 (A.R.).

b. Before an immigration judge, petitioner, through counsel, admitted the factual allegations against him and conceded that he is removable. Pet. App. 9; A.R. 65. But petitioner sought relief and protection from removal. He requested an adjudication of his previously filed application for asylum, which included applications for withholding of removal under 8 U.S.C. 1231(b)(3)(A), and for protection from removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

At a subsequent hearing, petitioner's counsel moved to withdraw from representing petitioner, and when pressed for a reason, told the immigration judge that she had been informed by an attorney in her office that petitioner had indicated that the basis for his asylum application was not true. A.R. 103-104. The immigration judge granted the motion to withdraw and said he

would consider whether he should recuse himself from the matter. A.R. 105. The immigration judge granted a three-month continuance to enable petitioner to obtain new counsel. *Ibid.* When petitioner appeared with new counsel at a later hearing, the immigration judge concluded that it was unnecessary to recuse himself and granted a further continuance to allow new counsel more time to prepare. A.R. 112-115.

c. On July 1, 2003, the immigration judge held a hearing in which he received documentary evidence and heard testimony from petitioner. A.R. 124-163. Petitioner testified that he had begun to practice Falun Gong in China, and that he had been arrested, detained for 11 days, and beaten three times by police officers who told him that he should not practice Falun Gong and that the meetings he was having two to three times a week with groups of 7 to 12 people were illegal gatherings. Pet. App. 11. Petitioner also testified that, as a consequence of his detention, he was terminated from his job, and that he feared that if he returned to China, he would be arrested. *Id.* at 11-12.

d. In an oral decision, the immigration judge denied each of petitioner's applications for relief. Pet. App. 8-20. The immigration judge concluded that petitioner had failed to meet his burden, for purposes of his asylum application, of proving that he had been persecuted or had a well-founded fear of being persecuted, should he return to China, on account of any of the protected grounds set forth in 8 U.S.C. 1101(a)(42)(A) and 1158(b)(1)(B)(i). Pet. App. 13, 16. The immigration judge found petitioner was not a credible witness, noting that there were significant discrepancies between his oral testimony and the information provided in his writ-

ten application, which petitioner had not been able to explain at the hearing. *Id.* at 14-16.

In addition to rejecting petitioner's asylum application on the merits, Pet. App. 18-19, the immigration judge also determined that the application had not been filed within the one-year time limit, and that petitioner had failed to establish that he had been prevented from meeting the time limit by "extraordinary circumstances," since his explanations about having hired a "friend" or "acquaintance" to help him with the application in July or August 1999 were too "various" and "vague." *Id.* at 16-18.

With respect to petitioner's application for withholding of removal, the immigration judge found that petitioner had failed to establish that there is a clear probability that his life or freedom would be threatened in China on account of any of the statutory grounds set forth in 8 U.S.C. 1231(b)(3). Pet. App. 19. Similarly, the immigration judge denied the application for CAT protection because petitioner had failed to establish that there were substantial grounds for believing he would be in danger of being tortured upon his return to China. *Ibid.*

The immigration judge granted petitioner's application for voluntary departure. Pet. App. 19.

3. Petitioner appealed the immigration judge's decision to the Board. A.R. 29-31. He argued that the immigration judge erred in ruling that he had failed to establish extraordinary circumstances justifying an exception from the one-year limit on asylum applications, in making an adverse credibility determination, and in excluding from evidence certain documents he had submitted. A.R. 12-16.

In accordance with 8 C.F.R. 1003.1(e)(4), the Board affirmed the immigration judge's decision without opinion. Pet. App. 6-7.

4. Petitioner filed a petition for review in the court of appeals. Pet. App. 3. After the case had been briefed, the court appointed pro bono counsel for petitioner, and the case was re-briefed and argued. 04-73949 Docket entry Nos. 26, 29, 33, 38, 40, 47 (9th Cir. Oct. 29, 2007 to Oct. 21, 2008).

Through his new counsel, petitioner argued that his asylum application should be granted because the record supported his claims to have suffered past persecution and to have a well-founded fear of future persecution, and because he had retained counsel to file his asylum application before the one-year time limit expired. Pet. C.A. Replacement Br. 13-16. With respect to his applications for withholding of removal and CAT protection, petitioner argued that his testimony had been credible and established a clear probability that he would be persecuted or tortured if he returned to China. *Id.* at 16-21. Finally, petitioner argued that his due process rights had been violated by the immigration judge's consideration of extra-record evidence and failure to recuse himself; by translation difficulties at the hearing; and by the provision of ineffective assistance by the attorneys who had filed petitioner's asylum application and represented petitioner before the immigration judge and the Board. *Id.* at 21-27.

The court of appeals, in an unpublished memorandum disposition, partly denied the petition for review and partly dismissed it for lack of jurisdiction. The court first concluded that it lacked jurisdiction to review the Board's discretionary determination that the asylum application was not timely filed, and that the facts un-

derlying his claim that the one-year time limit should be tolled were in dispute. Pet. App. 1-2, 4.

The court of appeals held that there was substantial evidence in the record to support the Board's adverse credibility finding—even discounting the immigration judge's reliance on extra-record evidence about tenets of Falun Gong that petitioner did not know. Pet. App. 4-5. The court noted that inconsistencies between petitioner's written statements and oral testimony were "material" and went "to the heart of [his] claim." *Id.* at 4. In light of the adverse credibility determination, the court concluded that the applications for withholding of removal and CAT protection had been properly denied. *Id.* at 5.

The court of appeals held that its review of petitioner's due process claims (including his claim of ineffective assistance of counsel) was barred because "[t]hese claims were not raised before the BIA." Pet. App. 5.

ARGUMENT

In this Court, petitioner does not challenge the court of appeals' decision that it lacked jurisdiction to review the denial of his asylum application as untimely, Pet. App. 4, or its decision that there was substantial evidence to support the adverse credibility findings that justified the denial of his applications for withholding of removal and for relief under the Convention Against Torture, *id.* at 4-5. Nor does petitioner re-assert his claims (Pet. C.A. Replacement Br. 21-25, 26-27) that the immigration judge inappropriately relied on extra-record evidence about Falun Gong or that the removal hearing was rendered unfair by translation difficulties or the immigration judge's failure to recuse.

Instead, petitioner now challenges (Pet. 7-12) only the court of appeals' decision not to address "his procedural due process claim[] concerning ineffective assistance of counsel" because that claim was "not raised before the BIA." Pet. App. 5. Petitioner contends that he should not have been required to exhaust his administrative remedies for two reasons: because the Board did not have the power to remedy his claim of ineffective assistance of counsel (Pet. 7-9), and because he was still being represented by allegedly ineffective counsel during the proceedings before the Board (Pet. 9-11). The decision of the court of appeals is correct and does not conflict with decisions from this Court or other courts of appeals. Accordingly, further review is not warranted.

1. Petitioner concedes that "an alien challenging a removal order" is statutorily required to "exhaust all administrative remedies prior to seeking judicial review by a [c]ourt of [a]ppeals." Pet. 7 (citing 8 U.S.C. 1252(d)(1)). But he contends that his case falls within a general exception for "certain constitutional challenges that are not within the competence of administrative agencies to decide." *Ibid.* (quoting *Barron* v. *Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004)).

Assuming *arguendo* that Section 1252(d)(1) is amenable to an exception for claims outside the agency's competence, that exception would not apply to petitioner's claim of ineffective assistance of counsel. The Board has long had procedures for considering (and granting relief on the basis of) ineffective-assistance claims. See *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A.), review denied, 857 F.2d 10 (1st Cir. 1988). In *Lozada*, the Board established the procedural requirements for filing a motion to reopen deportation proceedings (now called removal proceedings) based upon a claim of ineffective assistance

of counsel and required an alien to show that he was prejudiced by the action or inaction of his counsel. *Id.* at 639-640. In 2003, the Board, sitting en banc, reaffirmed that framework. See *In re Assaad*, 23 I. & N. Dec. 553.[1] Thus, petitioner errs in asserting (Pet. 8) that an ineffective-assistance claim like his "was not cognizable at the administrative level."

Because the Board can provide relief for claims of ineffective assistance of counsel that arise in removal proceedings, the courts of appeals have routinely—and correctly—held that they would not recognize an "exception" from the INA's statutory "exhaustion requirement for claims of ineffective assistance of counsel not raised before the BIA." *Goonsuwan* v. *Ashcroft*, 252 F.3d 383, 390 (5th Cir. 2001); see also, *e.g.*, *Lubale* v. *Gonzales*, 484 F.3d 1078, 1081 (8th Cir. 2007) (holding that an alien's "failure to assert his ineffective assistance claim before the BIA precludes judicial review"); *Bernal-Vallejo* v. *INS*, 195 F.3d 56, 64 (1st Cir. 1999) ("We decline to review the ineffective assistance claim because [the alien] has failed to exhaust his administrative remedies."); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 (10th Cir. 1999) ("We have held that because the BIA provides a mechanism for hearing an ineffective assistance claim, an alien's failure to raise the claim to the BIA deprives this court of jurisdiction to review it."); *Stewart* v. *United States INS*, 181 F.3d 587, 596 (4th Cir. 1999) ("Because [the alien] failed properly to

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[1] Earlier this year, the Attorney General ordered the initiation of a Department of Justice rulemaking to evaluate whether the procedural factors from *Lozada* that currently govern the Board's administrative resolution of claims of ineffective assistance of counsel in immigration proceedings should be revised. See *In re Compean*, 25 I. & N. Dec. 1, 3 (2009).

make a claim of ineffective assistance of counsel to the BIA, this Court cannot consider the claim."); *Mojsilovic* v. *INS*, 156 F.3d 743, 748 (7th Cir. 1998) ("[W]e lack jurisdiction over [the alien's] ineffective assistance claim because she did not raise it before the Board."); *Arango-Aradondo* v. *INS*, 13 F.3d 610, 614 (2d Cir. 1994) (declining to address an ineffective-assistance claim because the Board had not had a chance to consider it).

Petitioner contends (Pet. 12) that the decision below "conflicts" with the Second Circuit's decision in *Rabiu* v. *INS*, 41 F.3d 879 (1994). There is, however, no conflict. As the Second Circuit itself has explained, its opinion in *Rabiu* "explicitly recognized that the BIA should consider ineffectiveness claims in the first instance in order to 'avoid any premature interference with the agency's processes.'" *Zheng* v. *United States Dep't of Justice*, 409 F.3d 43, 46 (2005) (quoting *Rabiu*, 41 F.3d at 882). In *Rabiu*, the court of appeals was able to consider the alien's claim of ineffective assistance of counsel only because that claim was "part of the administrative record before the Board when it * * * considered his motion to reopen," and thus the agency had "considered the facts * * * and provided its expertise." 41 F.3d at 882. Petitioner here does not (and cannot) claim that the Board has already satisfied the purposes of the exhaustion requirement by "consider[ing] [his] ineffectiveness claims in the first instance." *Zheng*, 409 F.3d at 46.[2]

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[2] Petitioner also cites *Lopez de Jesus* v. *INS*, 312 F.3d 155, 162 n.47 (5th Cir. 2002), for the general proposition that exhaustion is not required when an alien's "due process claim does not assert a procedural error correctable by the BIA." Pet. 12. That case, however, involved a constitutional question about the retroactive application of a statutory amendment, rather than a claim of ineffective assistance of counsel. *Lopez de Jesus*, 312 F.3d at 162. The Fifth Circuit has made it clear that a general exception to exhaustion for circumstances in which ad-

Accordingly, there is no basis for further review of the first question presented by the petition.

2. Petitioner also contends (Pet. 9-11) that the court of appeals should not have required him to raise his ineffective-assistance claim in proceedings before the Board, because the attorney who represented him during his appeal to the Board was one of the attorneys who he now alleges provided him with ineffective assistance before the immigration judge. Petitioner cites no case supporting such a categorical exception to the exhaustion requirement.

Although petitioner was still represented by the same counsel during his appeal to the Board as during his removal hearing, his direct appeal was not his only opportunity to present his ineffective-assistance claim to the Board. To the contrary, such claims are most often presented in the context of motions to the Board to reopen proceedings, which are authorized by statute and regulation. See 8 U.S.C. 1229a(c)(7); 8 C.F.R. 1003.2(c). Accordingly, the Ninth Circuit has repeatedly refused to entertain aliens' claims of ineffective assistance when those claims had not already been presented to the Board in motions to reopen. See, *e.g.*, *Rashtabadi* v. *INS*, 23 F.3d 1562, 1567 (1994) ("To the extent that [the alien] argues that because he was represented on appeal [to the Board] by the same counsel who represented him at his deportation hearing, he could not raise his * * * claim, he can move the Board to reopen his appeal.") (citing prior cases); *Liu* v. *Waters*, 55 F.3d 421, 426 (1995) ("[W]e hold that [the alien] must first make a motion to reopen, with new counsel, if necessary, citing

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ministrative remedies are inadequate is "inapplicable" to claims of ineffective assistance before the Board—even when they are "couched in terms of a due process violation." *Goonsuwan*, 252 F.3d at 389.

ineffective assistance of counsel as his reason for failing to raise the claim earlier."); see also Gov't C.A. Replacement Br. 24 n.4 (noting that petitioner had not filed a motion to reopen asserting his ineffective-assistance claim).[3]

Other courts of appeals too have generally required an alien to "present his claim of ineffective assistance of counsel to the BIA, either on direct appeal *or through a motion to reopen.*" *Goonsuwan*, 252 F.3d at 390 (emphasis added); see also, *e.g.*, *Etchu-Njang* v. *Gonzales*, 403 F.3d 577, 584-585 (8th Cir. 2005) (finding no "good reason to excuse the issue exhaustion requirement" when petitioner's second attorney could have presented an ineffective-assistance claim with regard to his first

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[3] Petitioner characterizes the Ninth Circuit's unpublished decision in *Granados* v. *Keisler*, 252 Fed. Appx. 851 (2007), as having "held that a petitioner who receives ineffective assistance of counsel before the BIA may unequivocally raise this due process violation for the first time in his or her appeal to the Ninth Circuit." Pet. 11. But aside from lacking precedential force, *Granados* is distinguishable, because it addressed a claim of ineffective assistance that arose from alleged incompetence in the course of filing the motion to reopen itself. 252 Fed. Appx. at 853. Indeed, the case on which *Granados* relied had expressly distinguished itself from cases "where, without excuse, no motion to reopen was ever filed." *Granados-Oseguera* v. *Gonzales*, 464 F.3d 993, 997 n.5 (9th Cir. 2006), withdrawn and superseded on other grounds by *Granados-Oseguera* v. *Mukasey*, 546 F.3d 1011 (9th Cir. 2008). Because no motion to reopen was ever filed in petitioner's case, he was not permitted to raise his claim for the first time in the court of appeals.

Petitioner also compares (Pet. 8-9) his case with that of the alien in *Wang* v. *Reno*, 81 F.3d 808 (9th Cir. 1996), but *Wang* did not involve a claim of ineffective assistance of counsel. Indeed, the Ninth Circuit in *Wang* found that exhaustion of the alien's due-process claim before the Board was unnecessary because the claim did not even "involve review of an order of deportation or exclusion." *Id.* at 814. Here, by contrast, the only claim petitioner asserts arises directly from the removal proceeding against him, making *Wang*'s reasoning inapplicable.

attorney in a motion to reopen); *Bernal-Vallejo*, 195 F.3d at 64 (declining to review an ineffective-assistance claim because it had not been exhausted through a motion to reopen); *Castaneda-Suarez* v. *INS*, 993 F.2d 142, 144-145 (7th Cir. 1993) (same); *Dokic* v. *INS*, 899 F.2d 530, 532 (6th Cir. 1990) (same).

Because petitioner could have raised his ineffective-assistance claim in a motion to reopen proceedings before the Board, and the decision below does not conflict with that of any other court of appeals, further review of the second question presented is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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